

SERVICE DATE – AUGUST 3, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 279 (Sub-No.6X)

CANADIAN NATIONAL RAILWAY COMPANY—ABANDONMENT EXEMPTION—
IN NIAGARA COUNTY, N.Y.

Digest:¹ The Canadian National Railway Company is permitted to end its responsibility to provide rail service over a 0.15-mile line of railroad in the City of Niagara Falls, Niagara County, N.Y. However, the line will continue to be used for passenger service by the National Railroad Passenger Corporation and VIA Rail Canada.

Decided: August 2, 2012

By petition filed on May 23, 2012, the Canadian National Railway Company (CN) seeks an exemption under 49 U.S.C. § 10502(a) from the prior approval requirements of 49 U.S.C. § 10903 to abandon a 0.15-mile line of railroad between milepost 0.20 and milepost 0.35 in the City of Niagara Falls, Niagara County, N.Y. (the City), which comprises the entirety of the U.S. portion of its Grimsby Subdivision² (the Line). The Line consists of 0.10 mile of track located on the upper deck of the U.S. portion of the Whirlpool Rapids Bridge (the Bridge), and the remaining 0.05 mile consists of a single track extending between the eastern end of the Bridge and the beginning of the Niagara Branch of CSX Transportation, Inc. CN also seeks exemptions from 49 U.S.C. § 10904 (offer of financial assistance (OFA) procedures) and 49 U.S.C. § 10905 (public use provisions). CN has requested expedited consideration of its petition. Notice of the petition for exemption was served and published in the Federal Register on June 12, 2012 (77 Fed. Reg. 35,113-14).

For the reasons discussed below, the Board will grant the exemption from 49 U.S.C. § 10903, thereby authorizing the abandonment, subject to standard employee protective

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² CN states that its Grimsby Subdivision lies partly in Canada and partly in the U.S. The U.S. portion is one of only a few CN segments that extend briefly into the U.S. and that are owned and operated by CN, rather than by one of CN's U.S. operating affiliates.

conditions. The Board will also grant CN's request for an exemption from the OFA process. CN's request for exemption from the public use provisions will be denied as moot.

BACKGROUND

The Bridge, which is owned by the bi-national Niagara Falls Bridge Commission (NFBC), connects Niagara Falls, N.Y., and Niagara Falls, Ontario, Canada. The top deck of the Bridge is leased to CN and is designated for use by both freight and passenger rail traffic. The lower deck is used for passenger motor vehicles.

According to CN, the Bridge was constructed between 1896 and 1897, replacing an earlier bridge on the site. CN and NFBC's predecessors negotiated the relevant leases between 1853 and 1919. CN does not use the Bridge, but it has maintained the upper deck and made annual fixed lease payments to NFBC as required by the lease agreements.

CN contends that abandonment is warranted because, although it had once used the Line for overhead freight traffic, it previously determined that other routes are more efficient and has not moved any freight trains over the Line in over five years. CN represents that no freight rail customer has ever been located on or directly served by the Line and that, given the Line's location and short length, there is no reasonable possibility that new freight rail traffic will develop on the Line.

Currently the National Railroad Passenger Corporation (Amtrak) uses the Line for its Maple Leaf passenger rail service in conjunction with VIA Rail Canada (VIA) between New York City and Toronto, via Albany, Syracuse, Buffalo and Niagara Falls. This passenger rail service runs once daily in each direction. Amtrak, however, does not have an agreement with either CN or NFBC, and neither entity receives any compensation for Amtrak's use of the Line. CN states that Amtrak, VIA, and NFBC have reached an agreement in principle that will allow for Amtrak's and VIA's continued use of the Bridge and the right-of-way adjacent to the eastern end of the Bridge subsequent to the consummation of CN's proposed abandonment. Additionally, CN intends to transfer its interest in the Line (including any transferrable interest in the rail, bridge ties, and other track materials) to Amtrak for the purpose of continued rail passenger operations. Prior to finalizing these agreements, however, CN must obtain authority to abandon its common carrier obligation over the Line, so that neither Amtrak nor NFBC assumes that obligation.

The City supports the proposed abandonment.³ According to Thomas J. DeSantis, the Senior Planner for the City, "CN's proposed abandonment would advance the City's plans for

³ Pet., Ex. 4 at 1. The City clarifies that although it previously had believed that CN's proposed abandonment could cause "environmental and economic dislocation and jeopardize

(continued...)

the encouragement of passenger rail service . . . [and] is an important step in development of the new Niagara Falls International Railway Station and Intermodal Transportation Center” (Transportation Center).⁴ The Transportation Center would include a consolidated railroad intermodal facility that would contain Amtrak’s new Niagara Falls Station. Additionally, the New York State Department of Transportation has submitted comments stating that it does not oppose CN’s proposed abandonment.

DISCUSSION AND CONCLUSIONS

Pursuant to 49 U.S.C. § 10903, a rail line may not be abandoned without prior approval from the Board. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101 (RTP); and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny of CN’s proposal under 49 U.S.C. § 10903 is not necessary in this case to carry out the RTP. It is undisputed that the Line is no longer needed for continued freight rail service, as there has been no demand for service over the Line, nor has any local or overhead traffic moved over it, in over five years. Moreover, as discussed later, keeping the Line in place as a line of freight railroad would impede the development of the proposed Transportation Center. Further, by minimizing the administrative expense of the application process, an exemption will expedite regulatory action and will reduce regulatory barriers to exit, in accordance with 49 U.S.C. §§ 10101(2) and (7). An exemption, therefore, will also foster sound economic conditions and encourage efficient management by permitting the rationalization of an unnecessary common carrier rail line, consistent with 49 U.S.C. §§ 10101(5) and (9). Other aspects of the RTP will not be adversely affected by the use of the exemption process.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power, because there are no active shippers on the Line and no local or overhead freight traffic has moved over the Line in over five years.⁵ Further, no party has filed in opposition to the proposed abandonment.

(...continued)

passenger service,” it has subsequently concluded that, in fact, the proposed abandonment will further passenger service and not result in any adverse environmental effects. Id., Ex. 4 at 2 n.2.

⁴ Id., Ex. 4 at 1.

⁵ Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

Exemption from § 10904. Under 49 U.S.C. § 10904, a financially responsible person may offer to purchase, or subsidize continued rail operations over, a rail line sought to be abandoned. Here, however, CN seeks exemption from the OFA process at § 10904. We have granted exemptions from the OFA process from time to time when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service. See Norfolk S. Ry.—Aban. Exemption—In Norfolk & Va. Beach, Va., AB 290 (Sub-No. 293X) (STB served Nov. 6, 2007). In support of its request, CN contends that an exemption is needed so that the right-of-way can be used for the valid public purpose of developing the Transportation Center, while maintaining passenger rail service over the Line. No one has filed in opposition to CN's requested exemption from § 10904.

CN has justified an exemption from the OFA process. It has demonstrated that the right-of-way is needed for a valid public purpose—development of the Transportation Center and continuance of passenger rail service. See id. (exemption from OFA requirements granted for public transit plans and where there were no active shippers). Likewise, there is no overriding public need for continued freight rail service, as there have been no shippers on the Line for at least five years. Id. We therefore conclude that applying the OFA provisions in this situation is not necessary to carry out the RTP. Expediting the abandonment will minimize federal regulatory control over the rail system, expedite regulatory decisions, and reduce regulatory barriers to exit. 49 U.S.C. § 10101(2) and (7). Other aspects of the RTP will not be adversely affected. Because there has been no freight rail traffic over the Line for at least five years, nor has there been any demand for service, application of § 10904 is not necessary to protect shippers from an abuse of market power. Exempting the transaction from § 10904 therefore is warranted.

Exemption from § 10905. CN also seeks exemption from the public use provisions of 49 U.S.C. § 10905. Because requests for a public use condition were due by July 2, 2012, and no requests were received, CN's request for exemption from § 10905 will be denied as moot.

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the Board will impose the employee protective conditions set forth in Oregon Short Line—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979) (Oregon Short Line).

Environmental Review. CN has submitted a combined environmental and historic report and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 C.F.R. § 1105.11. The Board's Office of Environmental Analysis (OEA) has examined the environmental and historic report, verified CN's data, and analyzed the probable effects of the proposed action on the quality of the human environment.

OEA served an Environmental Assessment (EA) in this proceeding on June 29, 2012, recommending that the petition be approved without the imposition of any environmental conditions. Comments to the EA were due by July 27, 2012. No comments to the EA were received. Accordingly, based on OEA's recommendation, we conclude that the proposed abandonment will not significantly affect either the quality of the human environment or the conservation of energy resources.

As indicated, CN has requested expedited consideration of its petition. According to CN, the City has been awarded a Federal grant for the construction of the Transportation Center, but the funds are unlikely to be released until CN has abandoned the Line. CN expresses concern that if it is not allowed to consummate the abandonment expeditiously, the funds may not be released in time for use during the 2012 construction season. CN's request for expedited consideration is reasonable. Accordingly, the exemptions granted in this decision are being made effective on August 13, 2012.

It is ordered:

1. Pursuant to 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by CN of the Line, subject to the employee protective conditions set forth in Oregon Short Line.
2. CN's request for exemption from the OFA provisions of 49 U.S.C. § 10904 is granted.
3. CN's request for exemption from the public use provisions of 49 U.S.C. § 10905 is denied as moot.
4. The exemptions will be effective on August 13, 2012. Petitions to stay must be filed by August 8, 2012, and petitions to reopen must be filed by August 20, 2012.
5. Pursuant to the provisions of 49 C.F.R. § 1152.29(e)(2), CN shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the Line. If consummation has not been effected by CN's filing of a notice of consummation by August 3, 2013, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the one-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.